NO. 21654

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM EDWARD EARLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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I

JURISDICTIONAL STATEMENT AND STATEMENT OF THE CASE

On April 27, 1964, appellant was convicted upon his plea of guilty to an indictment charging him with violating Title 18, United States Code, Section 2113(a). He was sentenced to imprisonment for a period of 20 years by the Honorable Charles H. Carr, in the United States District Court in Los Angeles, California [C. T. 3]. 1/

On September 15, 1966, appellant filed a Motion pursuant

1/ "C. T." refers to Clerk's Transcript of Record on Appeal.

to Section 2255 of Title 28, United States Code, claiming (1) that his guilty plea was improperly coerced and is void because the United States Attorney "reneged" on his promise of leniency, and (2) that he was denied counsel following his arrest and statements subsequently obtained from him "were used by the Government to deprive petitioner of a fair trial, fair plea, and fair sentence" [C. T. 2-8].

On December 19, 1966, Judge Carr's order was entered, denying the appellant's motion under Section 2255 [C. T. 8-20], and on January 18, 1967, Judge Carr authorized the prosecution of this appeal in forma pauperis, noting in his order that his order denying appellant's motion under Section 2255 contained "the portions of the reporter's transcript which will be needed to decide the issues presented by his appeal" [C. T. 21-22].

On January 19, 1967, the appellant filed Notice of Appeal and Designation of Contents [C. T. 36-37].

The District Court had jurisdiction under the provisions of Title 18, United States Code, Sections 2113(a) and 3231, and Title 28, United States Code, Section 2255.

This Court has jurisdiction to review the judgment of the District Court denying appellant's motion pursuant to Title 28, United States Code, Sections 1291, 1294 and 2255.

II

STATUTES INVOLVED

Appellant's motion, the denial of which is the basis of the instant appeal, was made pursuant to the provisions of Title 28, United States Code, Section 2255, which, in pertinent part, provides:

> "A prisoner in custody under sentence of a court established by Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . ., or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."
>
> * * *
>
> "An appeal may be taken to the Court of Appeals from the order entered on the motion as from a final judgment or application for a Writ of Habeas Corpus. . . ."

III

STATEMENT OF FACTS

The Order Denying Motion under Section 2255, Title 28, United States Code, sets out the pertinent factual background of

this case, as follows:

"The Assistant United States Attorney who was assigned to the case has filed an affidavit in which he asserts that no promises of any kind were ever made to the petitioner.

"When petitioner first appeared in court for arraignment on arraignment day, the petitioner was advised as follows: that every person charged with an offense is entitled to a jury trial, to be represented by counsel, and to have witnesses subpoenaed in his behalf; that, if a defendant did not have funds and was financially unable to employ counsel, the court could and would appoint an attorney to represent him.

"When counsel for petitioner appeared with him and stated to the court that petitioner wished to change his plea from not guilty to guilty, the reporter's transcript discloses that the following occurred:

" 'THE CLERK: William Edward Early, are you the defendant William Edward Early?

"DEFENDANT WILLIAM EDWARD EARLY: Yes, sir.

"THE CLERK: Do you now withdraw your plea of not guilty which you have heretofore entered to the charges in the indictment?

"DEFENDANT WILLIAM EDWARD EARLY: Yes, sir.

" 'THE CLERK: Now the indictment charges that on or about March 2, 1964, in Los Angeles County, California, you by force and violence and by intimidation, knowingly and wilfully took $4,932.00 belonging to and in the care, custody, control and possession of the United California Bank, Florence and Central Branch, a bank whose deposits were insured by the Federal Deposit Insurance Corporation, and that in committing the offense charged you assaulted and put in jeopardy the life of Jennie Johnson, a teller; do you understand that charge?

"DEFENDANT WILLIAM EDWARD EARLY: Yes, sir.

"THE CLERK: What is your plea to that charge? Are you guilty or not guilty?

"DEFENDANT WILLIAM EDWARD EARLY: Guilty.

"THE CLERK: Do you plead guilty to the offense because you did commit it?

"DEFENDANT WILLIAM EDWARD EARLY: Yes, sir.

"THE COURT: In other words, it is correct that you did do the acts as read to you by the clerk?

"DEFENDANT WILLIAM EDWARD EARLY: Yes, sir.

"THE COURT: Has anyone promised you anything to enter this plea?

"DEFENDANT WILLIAM EDWARD EARLY: No, sir.

"THE COURT: Has anyone threatened you in any way at all?

"DEFENDANT WILLIAM EDWARD EARLY: No, sir.

"THE COURT: Have you been told what the penalty could be?

"DEFENDANT WILLIAM EDWARD EARLY: Yes, sir.

"THE COURT: I am sorry, you will have to put it in words, don't nod your head.

"DEFENDANT WILLIAM EDWARD EARLY: Yes, sir.

"THE COURT: You realize you can get 25 years on this charge?

"DEFENDANT WILLIAM EDWARD EARLY: Yes, sir.

"THE COURT: And nothing has been said to you by anyone that leads you to believe that any kind of promises have been held out to you to enter this plea?

"DEFENDANT WILLIAM EDWARD EARLY: No, sir.

"THE COURT: You are doing it of your own free will and accord?

"DEFENDANT WILLIAM EDWARD EARLY: Yes, sir.

"THE COURT: Because you did it?

"DEFENDANT WILLIAM EDWARD EARLY: Yes, sir." (p. 4, line 20 to p. 6, line 20).' "

IV

ARGUMENT

A. APPELLANT WAS CHARGED WITH, AND WAS AWARE THAT HE WAS CHARGED WITH, ROBBING A FEDERALLY INSURED BANK.

In appellant's opening brief he states:

"Appellant respectfully contends that the district court was without jurisdiction of the subject matter in his case -- was without jurisdiction to accept a plea and without jurisdiction to impose a sentence. This is true because the Government has failed to establish the commission of an offense against the laws of the United States." [Appellant's Opening Brief, p. 5]

Appellant further states:

"Consequently, in the case presently commanding our attention, there is no testimony or other evidence that appellant robbed a Federally insured bank, a pawnshop or a neighborhood fruit stand. . . . This is also true if the Indictment fails to state that such bank was Federally insured." [Appellant's Opening Brief, p. 6]

Appellant has not brought the indictment before this court by designation, and the issue was never raised below. However, the Reporter's Transcript, as quoted by Judge Carr in his order denying appellant's 2255 motion indicates the following:

"THE CLERK: Now the indictment charges that on or about March 2, 1964, in Los Angeles County, California, you by force and violence and by intimidation, knowingly and wilfully took $4,932.00 belonging to and in the care, custody, control and possession of the United California Bank, Florence and Central Branch, a bank whose deposits were insured by the Federal Deposit Insurance Corporation, and that in committing the offense charged you assaulted and put in jeopardy the life of Jennie Johnson, a teller; do you understand that charge?

"DEFENDANT WILLIAM EDWARD EARLY: Yes, sir.

"THE CLERK: What is your plea to that charge? Are you guilty or not guilty?

"DEFENDANT WILLIAM EARLY: Guilty."

[C. T. p. 10, Emphasis added by appellee.]

Thus, from the information before this Court, it is apparent that Federal jurisdiction existed. Furthermore, if there was any question as to whether the crime was committed within the jurisdiction of the District Court, the issue should have been raised there. At this later stage, unless it appears affirmatively from the record that the court was without jurisdiction, the judgment is presumptively valid. Archer v. Heath, 30 F. 2d 932 (9 Cir. 1929); Markham v. United States, 215 F. 2d 56 (4 Cir. 1954).

B. THE DISTRICT COURT PROPERLY REFUSED TO HOLD A HEARING ON THE QUESTION OF WHETHER APPELLANT'S GUILTY PLEA WAS COERCED AND VOID BECAUSE THE U. S. ATTORNEY "RENEGED" ON HIS PROMISES, AND BECAUSE CERTAIN STATEMENTS HAD BEEN OBTAINED FROM THE DEFENDANT IN THE ABSENCE OF COUNSEL.

1. No Hearing Was Necessary on Petitioner's Contentions of Promises and Coercion.

The existence of power to produce the prisoner does not, of course, mean that he should be automatically produced in every

Section 2255 proceeding, or that a hearing need always be held. Whether a prisoner should be produced and a hearing held depends upon the issues raised by the particular case, for Section 2255, Title 28, United States Code, provides that no hearing is necessary where "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." Cf. United States v. Fleenor, 177 F. 2d 482 (7 Cir. 1949).

In the instant case, no hearing was necessary because the motion, records and files before the District Court conclusively showed that appellant was entitled to no relief. As Judge Carr stated, there are at least five reasons why this was so:

> " . . . First, the allegations are vague, conclusionary, and are not sufficient to require a hearing. Second, there are no allegations that any alleged admissions or confession influenced petitioner to enter his plea of guilty. Third, the record shows that the plea made in open court was voluntarily and understandingly made. Fourth, the plea in open court, with his attorney present and under all the circumstances, was clearly a voluntary confession and admission of the crime. Fifth, the defendant's conduct at the time of plea shows a deliberate waiver of any claimed constitutional violations which may have occurred prior to the plea." [C. T. 12].

Thus, the District Court properly held, in effect, that the records

and files conclusively and expressly belied the prisoner's claim. Cf. Machibroda v. United States, 368 U.S. 487, 495 (1962).

In similar situations, many courts have held that, "Where, as in the instant case, the factual allegation is contradicted by the record made by the movant during the criminal proceeding, he is entitled to no relief and his motion may be dismissed without a hearing." Lynott v. United States, 360 F.2d 586, 588 (3 Cir. 1966). See also Semet v. United States, 369 F.2d 90 (10 Cir. 1966), and Putnam v. United States, 337 F.2d 313 (10 Cir. 1964).

Likewise, in the case of Burgett v. United States, 237 F.2d 247, 251 (8 Cir. 1956), cert. den. 352 U.S. 1031, 77 S. Ct. 596, the opinion pointed out that,

> "The court meticulously questioned the appellant as to his understanding of the charge against him. He and his counsel had every opportunity to tell the court of any threats or coercion used against him. . . . A defendant, having been represented by competent counsel, having been given every opportunity and right afforded by the law and having entered a plea of guilty, may not, without some reasonable basis, come into court years later and repudiate his prior plea. It is not the intent of Section 2255 nor the meaning of United States v. Hayman to require a hearing upon the mere assertion that a prior plea was false."

Where a defendant states in open court, with his attorney present, that his plea of guilty is made without promise or coercion, such statement ought to be binding upon the defendant. Otherwise, any defendant so convicted could later claim that someone connected with the Government who is now deceased or unavailable, made certain promises and threats which coerced the defendant's plea. In such a case, the prisoner's allegations would stand uncontradicted, and the Government would then be placed in the unfair position of having to prove an offense long after the time of indictment when it was originally prepared to do so.

As Judge Carr pointed out in the order appealed from here,

> "In the Central District of California, formerly the Southern District of California, for several years the yearly criminal case load has exceeded 1,200 cases, in about eighty per cent of which or approximately 1,000 cases pleas of guilty are entered. These cases could result in a bumper crop of motions under Section 2255. Frivolous petitions for writs and motions under Section 2255 have been a severe burden." [C. T. 17].

It is submitted that where, as in this case, a defendant pleads guilty upon being advised of his constitutional rights by the court, while being represented by counsel, and after assuring the court that he has not been threatened in any way, that he has received no promises of any kind, that he understands the maximum

sentence that might be imposed, and that he is pleading guilty because he is guilty; and that where, as here, the Assistant United States Attorney handling the case at the time had filed an affidavit denying the prisoner's charges; and that where, as here, there are before the court no circumstances whatsoever as would lend credence to the prisoner's belated assertion that he lied to the court at the time of conviction and was nowtelling the truth about the voluntariness of his plea -- that in such a situation a court is justified in holding that a conclusive showing has been made that the prisoner is entitled to no relief.

2. No Hearing Was Necessary On Petitioner's Contentions of Confessions Obtained in Absence of Counsel.

Appellant contends that his confession prior to plea, "wrung from the accused in the absence of counsel, renders the instant judgment of conviction constitutionally void" (appellant's opening brief, p. 9).

As the District Court order pointed out, "Petitioner's contentions respecting the lack of counsel cannot be sustained since he was sentenced on April 27, 1964, before Escobedo v. Illinois, 378 U.S. 478, became effective." [C.T. 19]. Thus, a conclusive showing existed that the petitioner was entitled to no relief, in regard to these contentions.

But even had petitioner's case occurred after Escobedo, it

would seem that the subsequent securing of counsel by the defendant, who presumably analyzed the case prior to defendant's entry of plea, should foreclose unlitigated questions under the Fourth, Fifth and Sixth Amendments, especially where, as here, the petitioner makes no showing, other than his own sudden recollection, which would indicate a possible violation of his constitutional rights.

The requirements of an orderly society and the administration of justice should permit the District Court to make a conclusive finding without a hearing that a petitioner is entitled to no relief where, as here, the record and files and Reporter's Transcript so clearly indicate that the asserted constitutional violations, if any there truly be, have been knowingly and intelligently waived.

V

CONCLUSION

A review of the record and order denying appellant's motion discloses no error and, accordingly, the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ William J. Gargaro, Jr.
WILLIAM J. GARGARO, JR.